

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 9, 2007 Session

**ELGA JEAN HINSON, ET AL. v. CLAIBORNE & HUGHES HEALTH  
CENTER**

**Appeal from the Circuit Court for Williamson County  
No. 06185 R. E. Lee Davies, Judge**

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**No. M2006-02306-COA-R3-CV - Filed February 26, 2008**

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A ninety-one year old man died a month after he was admitted to the hospital. Almost a year after his death, two of his daughters filed a complaint against the nursing home where he had resided prior to his hospital admission. They alleged that the nursing home's employees had been guilty of negligence which caused or contributed to their father's death. The trial court granted summary judgment to the nursing home on the wrongful death claim because Plaintiffs were unable to successfully refute the affidavit of the defendant's medical expert, who testified that the medical records showed that Plaintiffs' father had died from causes unrelated to any act or omission on the part of the nursing home or its employees. The court also dismissed all other claims based on general allegations of negligence by the nursing home because Plaintiffs' affidavits failed to allege any injuries with specificity and because of the passing of Tennessee's one-year statute of limitations period. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which, E. RILEY ANDERSON, SP. J., joined. WILLIAM B. CAIN, J., not participating

Christopher Kim Thompson, Murfreesboro, Tennessee, for the appellants, Elga Jean Hinson and Carole Joan Lynch.

David L. Steed, Nashville, Tennessee, for the appellee, Claiborne and Hughes Health Center.

**OPINION**

**I.**

In 2001, Mr. Irvin Epley became a resident of the defendant Claiborne & Hughes Health Center, a nursing home in Franklin, Tennessee. On February 26, 2005, Claiborne & Hughes transported the ninety-one year old Mr. Epley to Williamson County Medical Center because he was experiencing respiratory distress. A chest x-ray taken in the emergency room indicated aspiration

pneumonia, and the patient was started on IV antibiotics, oxygen and breathing treatments. Of particular relevance to this case are the hospital nursing notes, which reported that Mr. Epley suffered from several other serious medical conditions, but that his appetite was good, that his abdomen was soft without tenderness and remained so during his first few days at the hospital, that his bowel sounds were normal, and that his bowel was functioning normally.

On March 2, 2005, Mr. Epley began to complain of epigastric pain, and doctors subsequently noted that his abdomen was distended, firm and tender, and that his bowel sounds were faint. X-rays taken shortly afterward revealed free air below his diaphragm, which is a possible sign of bowel perforation. After a surgical consult, Mr. Epley was brought into the operating room for an exploratory laparotomy. During the ensuing eight hour procedure, surgeons discovered a colon perforation. They removed the damaged section of colon, reconnected the undamaged sections, cleansed and irrigated the abdominal cavity and closed the incision. Mr. Epley proceeded well with recovery until March 28, 2005. That afternoon, Mr. Epley began choking, experienced probable aspiration, and died.

On March 24, 2006, thirteen months after Mr. Epley's departure from Claiborne & Hughes, two of his daughters ("Plaintiffs") filed suit against the defendant nursing home.<sup>1</sup> They claimed in general terms that the nursing home was negligent in its care of their father, causing him to suffer abuse and neglect, pain and suffering, and finally death. The nursing home filed a motion for a more definite statement, and Plaintiffs filed an amended complaint on May 30, 2006. The nursing home then filed a motion for summary judgment, asking the trial court to dismiss Plaintiffs' wrongful death claim. The motion was accompanied by medical records from Williamson County Medical Center and the affidavit of Dr. George Wright, a Nashville physician specializing in gastroenterology. Dr. Wright testified that he had reviewed the medical records in the case and that in his medical opinion "to a reasonable degree of medical certainty" Mr. Epley's death was not caused by any act or omission of the nursing home.

Dr. Wright discussed the hospital's nursing notes, the physician progress notes, the surgeon's operative records and the pathologist's report on the removed section of colon. He explained that those records led him to conclude that the colon perforation occurred in the hospital the night before his abdominal symptoms were noted, and that it was most likely the result of ischemic changes: that is, loss of blood supply to the colon, "which is not an unusual occurrence in patients of advanced years." He further noted that the discharge summary from the medical center showed that Mr. Epley "vomited on March 28, 2005, and aspirated the vomitus into his lungs during a choking incident," and that this incident, in conjunction with the development of an irregular heartbeat, arrhythmia and hypoxia caused his death, which could not be attributed to any acts or omissions on the part of any caregiver at Claiborne & Hughes.

Plaintiffs responded to the motion for summary judgment by claiming that Dr. Wright's affidavit was defective because it failed to fully comply with the requirements of Tenn. Code Ann. § 29-26-115(a)(1). They also submitted the affidavit of Registered Nurse Rosemary Cox. She

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<sup>1</sup>Mr. Epley has a third daughter, who declined to participate in this lawsuit.

testified that she worked in long term nursing care before 2003, that she was familiar with the standard of care at Claiborne & Hughes, and that in her opinion “within a reasonable degree of nursing probability” the care the defendant administered to Mr. Epley fell below the standard of care and “did contribute to his diminished quality of life with a subsequent poor resident outcome.”

The trial court conducted a hearing on the defendant’s motion for summary judgment on August 21, 2006. The court subsequently granted the motion and dismissed Plaintiffs’ wrongful death claim, finding that the defendant had established through competent medical testimony that Mr. Epley’s death was not caused by any act or omission on the part of Claiborne & Hughes Health Center. The court noted, however, that Plaintiffs’ complaint could be construed as seeking damages for other nonspecific injuries allegedly suffered by Mr. Epley during his tenure at Claiborne & Hughes. Because their complaint was filed more than one year after Mr. Epley left the nursing home, the court entered an order giving Plaintiffs until September 18, 2006, to demonstrate that they had a cause of action for such injuries which was not barred by the one year statute of limitations.

On August 23, 2006, Claiborne & Hughes filed a motion to dismiss Plaintiffs’ remaining claims on the basis of the passing of the statute of limitations. In response to the trial court’s order and the defendant’s motion, Plaintiffs filed personal affidavits basically asserting that no health care professional had informed them of Claiborne & Hughes’ alleged negligence and that they were not made aware of such negligence until after their father’s death. On September 18, 2006, the trial court granted the defendant’s motion and dismissed all of Plaintiffs’ remaining claims.

Plaintiffs appeal to this court. They argue that the trial court erred in (1) granting Claiborne & Hughes’ motion for summary judgment on their wrongful death claim because Dr. Wright’s affidavit was defective in that it failed to demonstrate knowledge of the standard of care and because they demonstrated a genuine issue of material fact as to the cause of Mr. Epley’s death; and (2) dismissing their claim for injuries based on an expiration of the statute of limitations because they submitted personal affidavits demonstrating that they were unaware of any negligence by Claiborne & Hughes until after Mr. Epley’s death.

## II. SUMMARY JUDGMENT

A trial court’s decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn. 2005); *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004).

The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Blair*, 130 S.W.3d at 764; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when the

undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion - that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Draper*, 181 S.W.3d at 288. In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. *Draper*, 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001).

A party seeking summary judgment has the burden of demonstrating that its motion satisfies the requirements of Rule 56, including its entitlement to judgment as a matter of law. *Carvell v. Bottoms*, 900 S.W.2d 23, 25 (Tenn. 1995); *Jones v. City of Johnson City*, 917 S.W.2d 687, 689 (Tenn. Ct. App. 1995). When a party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts which must be resolved by the trier of fact. The burden shifting framework has been addressed a number of times by the Tennessee Supreme Court. *Blair*, 130 S.W.3d at 767.

To properly support its motion, a moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

*Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88-89 (Tenn. 2000) (citations omitted).

The summary judgment for defendant nursing home in the case before us was based upon the lack of a causal relationship between any conduct by the nursing home or its staff and the death of Mr. Epley. In their appellate brief, Plaintiffs state that the gravamen of their complaint was that "the deceased was neglected, suffered injuries from the neglect and later death." Plaintiffs also characterize their claims as negligence, including medical malpractice.

Expert testimony is required to establish negligence and causation in medical malpractice cases, except where the act of alleged malpractice lies within the knowledge of ordinary laymen. *Mercer v. HCA Health Services of Tennessee*, 87 S.W.3d 500, 507 (Tenn. Ct. App. 2002); *Stokes v. Leung*, 651 S.W.2d 704 (Tenn. Ct. App. 1982). See also *Baldwin v. Knight*, 569 S.W.2d 450 (Tenn. 1978). Tennessee Code Annotated § 29-26-115 sets out the requirements for establishing a malpractice claim:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time

the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

Claiborne & Hughes filed the affidavit of Dr. Wright in support of its motion for summary judgment on the issue of causation or, in the words of the statute, "proximate result." Plaintiffs' claim is based on the theory that the colonic perforation Mr. Epley experienced in the hospital was the cause of his death and that the perforation itself was the result of acts or omissions of the nursing home employees. As a Tennessee-licensed practicing gastroenterologist, Dr. Wright was qualified under the requirements of part (b) of the statute to present expert testimony as to the medical course of Mr. Epley's stay in Williamson County Medical Center and as to the claims of Plaintiffs. *See Payne v. Caldwell*, 796 S.W.2d 142, 143 (Tenn. 1990). He testified that negligence by the defendant nursing home was not the proximate cause of Mr. Epley's death, and he explained his reasons for reaching that conclusion. Such testimony, if unrefuted, negated the required element of causation necessary to Plaintiffs' wrongful death claim.

When the party moving for summary judgment affirmatively negates an essential element of the non-moving party's claim, non-moving parties must, then, come forward with evidence to at least create a disputed issue of fact as to the existence of the essential element of their case that has been negated. They may accomplish this by (1) pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) rehabilitating evidence challenged by the moving party, or (3) producing additional evidence that creates a material factual dispute. *Doe I v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 41 (Tenn. 2005); *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998).

In the case before us, Plaintiffs attack the grant of summary judgment on two bases: (1) that Dr. Wright's affidavit is deficient and, therefore, Claiborne & Hughes failed to negate an essential element of their claim, and (2) that they presented evidence that created an issue of fact with regard to the cause of death.

Plaintiffs argue that Dr. Wright's affidavit was defective because it failed to address the applicable standard of care ("the recognized standard of acceptable professional practice") and any

deviations from it, as set out in Tenn. Code Ann. § 29-26-115(a)(1) and (2). However, as the statute indicates, it is the plaintiff who bears the ultimate burden of proving all of the elements of a medical malpractice claim. Because a plaintiff cannot sustain such a cause of action in the absence of any one of the required elements, a defendant need only negate one of the elements to prevail on a summary judgment motion. *See Norris v. East Tennessee Children's Hospital*, 195 S.W.3d 78, 87 (Tenn. Ct. App. 2005) (stating that if a plaintiff fails to establish any one of the three required elements, his or her medical malpractice claim is subject to dismissal).

In the present case, Plaintiffs presented additional evidence, in the form of the affidavit of Rosemary Cox, R.N., and Mr. Epley's death certificate, which they contend create a material factual dispute as to the cause of his death. As we noted above, Nurse Cox testified that she was familiar with the standard of care at nursing homes and that, in her opinion, the care Mr. Epley received fell below the standard of care and "did contribute to his diminished quality of life with a subsequent poor resident outcome." She further stated that "Mr. Epley's hospitalization on February 26, 2005, and subsequent death were more likely than not directly *impacted* by the failure of Claiborne-Hughes to comply with acceptable standards of practice."<sup>2</sup> (Emphasis added).

A nurse is not an expert who can testify as to medical causation. Tennessee Code Annotated § 29-26-115(b), quoted above, requires expert testimony from a health care professional who is licensed to practice and has practiced a profession or specialty "which would make the person's expert testimony relevant to the issues in the case." In *Richberger v. West Clinic, P.C.*, 152 S.W.3d 505 (Tenn. Ct. App. 2004), this court held that since a nurse is prohibited by statute from making a medical diagnosis, he or she is likewise prohibited from testifying as to medical causation. *See* Tenn. Code Ann. § 63-7-103(b); *Bishop v. Smith Nephew Richards, Inc.*, No. 02A01-9405-CV-00108, 1995 WL 99222 at \*5 (Tenn. Ct. App. Mar. 10, 1995); *Nash v. Goodlark Hospital*, 1990 WL 56192 at \*2 (Tenn. Ct. App. May 4, 1990).<sup>3</sup>

The death certificate, even if it were considered competent expert proof, does not contradict Dr. Wright's testimony. In the space where the physician or medical examiner is to list the immediate cause of Mr. Epley's death followed by the conditions leading to that immediate cause, the death certificate sets out the immediate cause death as Arrhythmia, "due to (or as a consequence

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<sup>2</sup>There is a significant question whether Nurse Cox's testimony meets the requirements as to the level of certainty necessary to establish causation. Our courts have consistently held that in order to prevail in a medical malpractice case in Tennessee, the plaintiff must prove that it is more likely than not that the defendant's negligence caused the plaintiff to suffer injuries which would not have otherwise occurred. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993); *Bara v. Clarksville Memorial Health Systems, Inc.*, 104 S.W.3d 19 (Tenn. Ct. App. 2002). We need not address that question, however, since the nurse is not competent to testify as to medical causation.

<sup>3</sup>Although we have held that a registered nurse is not competent to testify as to medical causation, this court has held in several unpublished cases that no such exclusion applies where the question involves the standard of care for nursing: "[i]n cases where the claimed medical malpractice relates to the nursing care provided, the affidavit of a registered nurse has been considered by our courts to be appropriate expert testimony." *Vaughn v. John W. Harton Regional Medical Center*, M2006-01326-COA-R3-CV, 2007 WL 2751800 at \*3 (Tenn. Ct. App. Sept. 21, 2007) (petition to rehear denied 11/19/07) (citing *McBee v. HCA Health Services of Tenn.*, No. M2000-00271-COA-R3-CV, 2000 WL 1533000 at \*3 (Tenn. Ct. App. Oct. 18, 2000) (no Tenn R. App. P. 11 application filed)).

of ) Hypoxia, due to (or as a consequence of) aspiration pneumonia.” The section for “[o]ther significant conditions contributing to death but not resulting in the underlying cause” lists Colonic Perforation and Fragile X Ataxia Syndrome. Plaintiffs have suggested that Mr. Epley’s colonic perforation was due to the negligence of the defendant nursing home and was also the cause of his death. Dr. Wright’s affidavit refutes the theory that the nursing home was responsible for the perforation, and the death certificate indicates that, in any case, the perforation did not cause his death.

Whether Plaintiffs’ claim is for medical malpractice or for negligence based on failure to adhere to some other standard of care, the defendant nursing home presented evidence negating any causal link between its care of Mr. Epley and his later death. Plaintiffs did not present expert testimony from a doctor of any specialty to contradict Dr. Wright’s conclusion regarding the lack of causation between Mr. Epley’s death and any conduct or care by the nursing home. In fact, they presented no competent evidence to create a dispute of fact regarding the cause of Mr. Epley’s death. Consequently, Plaintiffs’ claims against Claiborne & Hughes for their father’s death must fail.

We hold that Claiborne & Hughes was entitled to summary judgment on Plaintiffs’ wrongful death claim. Accordingly, we affirm the trial court’s grant of summary judgment on this issue.

### **III. THE STATUTE OF LIMITATIONS**

While the primary claim herein was for Mr. Epley’s death, Plaintiffs also assert that their complaint included claims that Mr. Epley suffered other injuries during his stay in the nursing home. The complaint was filed thirteen months after Mr. Epley left the nursing home.

The trial court gave Plaintiffs an opportunity to more specifically allege any injuries that Mr. Epley might have suffered while under the care of the defendant nursing home and to present reasons why claims for those injuries should not be barred by the expiration of the one year statute of limitations. Plaintiffs responded with identical affidavits which asserted that no health care professional had ever informed them that the nursing home had caused injury to Mr. Epley, that they did not consult with a lawyer and a nurse who agreed to investigate the case until May of 2005, and that they did not see their father’s death certificate until August of 2005. Neither the amended complaint nor the affidavits identify any specific injuries, the date of those injuries, or the acts or omissions by nursing home employees alleged to have caused such injuries.

Actions for “injury to the person” are to be commenced within one year from the accrual of the cause of action. Tenn. Code Ann. § 28-4-101; *see also* Tenn. Code Ann. § 29-26-116(a)(i). Although their complaint was filed more than one year after Mr. Epley left the defendant nursing home, Plaintiffs argued that they are entitled to have the benefit of Tenn. Code Ann. § 29-26-116(a)(2), which creates a possible exception to the strict requirements of the one year limitations period: “In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.”

Our courts have consistently held that under the discovery rule the applicable statute of limitations begins to run when the plaintiff discovers, or in the exercise of reasonable care should

have discovered, that an injury was sustained as a result of wrongful conduct by the defendant. *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998); *Roe v. Jefferson*, 875 S.W.2d 653 (Tenn. 1994). The statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred and as a reasonable person is not put on inquiry. *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W.2d 341, 344 (Tenn. 1983). “[M]ere ignorance and failure of the plaintiff to discover the existence of a cause of action is not sufficient to toll the running of the statute of limitations.” *Soldano v. Owens-Corning Fiberglass Corp., et al.*, 696 S.W.2d 887, 889 (Tenn. 1985) (quoting 18 TENN JURISPRUDENCE 92); *Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977); *Cavalier Metal Corp. v. Finch & McBroom*, No. W2004-01536-COA-R3-CV, 2005 WL 645201, at \*9 (Tenn. Ct. App. Mar. 17, 2005) (Tenn. R. App. P. 11 application denied October 17, 2005).

In their affidavits, Plaintiffs essentially simply say that nobody told them that the nursing home was negligent. Their amended complaint contains a somewhat rambling account of Mr. Epley’s experiences at the defendant nursing home, including mention of various hospital admissions for different conditions as well as incidents where he was found lying on the floor. It nowhere specifies particular acts or policies by the defendant which caused or contributed to these incidents.

Plaintiffs failed to specify what “other injuries” the nursing home allegedly caused or when and how such injuries might have taken place.

The trial court granted Plaintiffs the opportunity “to demonstrate to the Court that there were causes of action for other injuries of Plaintiff’s decedent that were not barred by the one-year statute of limitations.” Plaintiffs’ affidavits are insufficient to establish why, in the exercise of reasonable care they did not discover that their father’s injuries were the result of wrongful care, or at least why they were not put on inquiry as to that possibility.

The trial court’s order of dismissal included the following findings:

(1) the amended Complaint makes no allegation that there were injuries that were not discovered until less than one year prior to the filing of the original complaint; (2) the vague affidavits filed by Plaintiffs do not identify any injuries that were not discovered until the period within one year prior to the filing of the Complaint; (3) the Amended Complaint does not clearly set forth the injuries alleged in the action, despite the Court’s previous order compelling Plaintiffs to do so; and (4) in light of the fact that the claim for Plaintiff’s decedent’s death having been dismissed, any such cause of action is separate and distinct from the wrongful death action.

We agree with the trial court’s findings, and they are supported by the record. Accordingly, Plaintiffs’ claims for negligence unrelated to the death of Mr. Epley were properly dismissed under Tenn. R. Civ. P. 12.02(6).

#### IV.



The ruling of the trial court is affirmed. We remand this case to the Circuit Court of Williamson County for any further proceedings necessary. Tax the costs on appeal to the appellants, Elga Jean Hinson and Carole Joan Lynch.

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PATRICIA J. COTTRELL, JUDGE